

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 19 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0041-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
MARK ANTHONY LUGO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR035437

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Mark Anthony Lugo

Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner Mark Lugo seeks review of the trial court's order dismissing his successive proceeding for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he was entitled to relief based on newly discovered material

facts. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Lugo has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Lugo was convicted of sexual conduct with a minor, sexual abuse, molestation, and attempted sexual conduct, all dangerous crimes against a child, who was then eleven years old. This court affirmed his convictions, but vacated the sentences imposed on two counts. *State v. Lugo*, No. 2 CA-CR 92-0561 (memorandum decision filed Jan. 31, 1994). Lugo was resentenced and did not file a subsequent appeal. He thereafter filed a notice of post-conviction relief, which the trial court summarily dismissed, finding it had been filed untimely. This court granted relief in part, concluding the time limits set forth in Rule 32.4(a) were not applicable to certain of Lugo’s sentences, which had been imposed before September 30, 1992. *State v. Lugo*, No. 2 CA-CR 2007-0336-PR, ¶¶ 8, 10 (memorandum decision filed Apr. 30, 2008). Lugo then instituted a second Rule 32 proceeding, and the trial court summarily denied relief, as did this court on review. *State v. Lugo*, No. 2 CA-CR 2009-0201-PR, ¶¶ 2-3 (memorandum decision filed Dec. 2, 2009).

¶3 In August 2010, Lugo initiated another Rule 32 proceeding,¹ raising claims of newly discovered material facts and actual innocence, based on his assertion that he

¹Lugo entitled the document he filed to initiate the proceeding a “[n]otice of post-conviction relief,” but he also referred to it internally as a “Rule 32 petition.” The document contained argument, several exhibits, and a “[d]eclaration by Mark A. Lugo” containing various factual assertions. The state filed an “[o]pposition to petition for post-conviction relief.” In its ruling, the trial court dismissed Lugo’s “notice,” but also referred to the document as a “petition.” The terms “notice” and “petition” “apply to two

had “been given information that his case . . . was prosecuted by Kenneth J. Peasley” who, Lugo alleged, had “introduc[ed] false testimony from the state witnesses in this case.” The trial court summarily dismissed the proceeding, pointing out that Peasley had not actually prosecuted the case against Lugo and that nothing in the record showed he had been involved in the case in any way.

¶4 After the trial court issued its ruling, Lugo filed a motion for reconsideration, arguing the court had not considered his “responses in this matter,” which he alleged he had “filed before he had received the court’s decision.” Lugo went on to allege the court had violated his constitutional rights by denying him a hearing on what he described as a writ of habeas corpus.² He also again alleged Peasley had been involved in and had committed misconduct in the case, and made new allegations of prosecutorial misconduct against the actual prosecutor in the case, Kathleen Mayer. The trial court denied Lugo’s motion.

¶5 Lugo then filed a motion “to amend his post-conviction relief petition,” conceding that Peasley had not been the prosecutor in his case, but alleging misconduct

distinct procedural steps in a Rule 32 action.” *State v. Rosales*, 205 Ariz. 86, ¶ 6, 66 P.3d 1263, 1265 (App. 2003). But, as detailed below, whether we characterize Lugo’s filing as a notice or a petition, the trial court here was entitled to dismiss the proceeding.

²Lugo stated he had “filed this state habeas corpus because he was convicted on evidence that was insufficient to prove that he [had] molested the victim in this case.” Because Lugo’s argument “attack[s] the validity of his . . . conviction,” this claim is not the basis for a writ of habeas corpus, but is instead subject to the procedures set forth in Rule 32. *See* Ariz. R. Crim. P. 32.3. In any event, no separate document purporting to be a writ of habeas corpus appears in the record. And, although some of Lugo’s filings refer to habeas corpus, he has not developed an argument based on insufficiency of evidence in any of them.

on the part of Mayer and the Pima County Attorney. Almost two months later, Lugo filed a motion to vacate his convictions and sentences, arguing he was entitled to that relief because the court had not ruled on the motion to amend within twenty days. The court denied the motion, stating it had not received the motion to amend, but that it would have denied the motion because it was filed after the trial court's dismissal.³

¶6 In his petition for review, Lugo alleges the trial court abused its discretion in dismissing the proceeding and in either ruling against him or not ruling at all on various other motions he filed below. He maintains that, although his initial allegations were based entirely on alleged actions by Peasley, he had intended to "allege[] that it was Kathleen Mayer that had committed prosecutorial [mis]conduct in this case." And he contends the trial court abused its discretion in denying his motion for leave to amend to correct this purported mistake.

¶7 As an initial matter, we note that, in his document initiating this proceeding, Lugo did not set forth a reason for not having raised his claims of newly discovered material facts and prosecutorial misconduct in a previous petition. *See* Ariz. R. Crim. P. 32.2(b) ("When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive . . . post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition . . ."). To the extent the trial court treated that document solely as a notice of post-conviction relief, it therefore could have dismissed

³We treat the motion to amend as having been filed because a document described as such is included in the record on review.

the notice solely on that basis. *See id.* (“If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition . . . , the notice shall be summarily dismissed.”).

¶8 Likewise, to the extent the trial court treated the document as a combined notice and petition and dismissed it because it failed to “present[] a material issue of fact or law which would entitle [Lugo] to relief,” Ariz. R. Crim. P. 32.6(c), the court did not abuse its discretion. As the court found, and as Lugo ultimately conceded, Peasley was not involved in this matter and no claim of prosecutorial misconduct could therefore lie on the basis of his actions.

¶9 Furthermore, we cannot say the trial court abused its discretion in denying Lugo’s motion to amend his filing to include allegations against Mayer or other persons in the Pima County Attorney’s office. First, we reject Lugo’s argument that the court was required to rule on the motion within twenty days under Rule 32.6(c). That rule applies to the court’s consideration of a petition for post-conviction relief, not to its treatment of subsequent motions such as the one at issue here.

¶10 Lugo also argues there “is no time limit” as to “when an amendment can be filed” under Rule 32.6(d) and that the trial court therefore abused its discretion in denying his motion because he had filed it after the court had dismissed the Rule 32 proceeding. We agree that Rule 32.6(d) no longer provides an express bar against motions to amend after the entry of judgment in a Rule 32 proceeding. It was amended in 1992 to remove language stating that amendments should be liberally allowed “prior to entry of judgment.” 170 Ariz. LXXII (1992). But the current version of Rule 32.6(d) requires a

showing of good cause, and Lugo's motion contained no facts or argument even attempting to establish good cause for amendment, rather it merely challenged the trial court's past rulings. Therefore, the court correctly denied the motion. *Cf. State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (fact that trial judge comes to proper conclusion for wrong reason is irrelevant; appellate court is obliged to affirm ruling if result was legally correct for any reason). Thus, although we grant the petition for review, we deny relief.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge